

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of
Requests for Waiver by
Grants/Cibola County School District
Grants, New Mexico
Jemez Pueblo Tribal Consortium
Jemez and Zia Pueblos, New Mexico
Schools and Libraries Universal Service
Support Mechanism
File No. SLD-161054349
File No. SLD-161061354
CC Docket No. 02-6

ORDER

Adopted: October 17, 2018

Released: October 17, 2018

By the Chief, Telecommunications Access Policy Division, Wireline Competition Bureau:

I. INTRODUCTION

1. In this Order, we grant the Requests for Waiver filed by the Jemez Pueblo Tribal Consortium (Consortium) and Grants/Cibola County School District (Grants/Cibola). Both petitioners seek a waiver of the Commission’s rules governing the service implementation deadline applicable to their funding year 2016 funding requests for special construction under the E-Rate program (more formally known as the schools and libraries universal service support program).

2. We find that the unique circumstances in these matters warrant a waiver. With respect to the Consortium, although it has now completed construction and begun using its self-provisioned network, in granting the Consortium’s waiver request, we remand its funding request to the Universal Service Administrative Company (USAC or the Administrator) with instructions to extend the service implementation deadline to July 31, 2018 and process the Consortium’s outstanding invoices. With respect to Grants/Cibola, in granting Grants/Cibola’s waiver request, we remand its funding request to USAC with instructions to extend the deadline by which it must complete special construction and light its network to April 30, 2020.

1 The Commission may waive any provision of its rules on its own motion and for good cause shown. See 47 CFR § 1.3. In general, the Commission may grant a waiver if: (1) special circumstances warrant a deviation from the general rule; and (2) such deviation would better serve the public interest than strict adherence to the general rule. See Northeast Cellular Telephone Co. v. FCC, 897 F.2d 1164, 1166 (D.C. Cir. 1990) (Northeast Cellular). In addition, when determining whether to grant a waiver, the Commission may take into consideration questions of hardship, equity, or more effective implementation of overall policy on an individual basis. WAIT Radio v. FCC, 418 F.2d 1153, 1159 (D.C. Cir. 1969), aff’d, 459 F.2d 1203 (D.C. Cir. 1972) (WAIT Radio). The burden of proving that a waiver is appropriate in a particular case rests with the petitioner. See Tucson Radio Inc. v. FCC, 452 F.2d 1380, 1382 (D.C. Cir. 1971).

2 Request for Waiver by Jemez Pueblo Tribal Consortium, CC Docket No. 02-6 (filed July 20, 2018) (Consortium Request for Waiver); Request for Waiver by Grants/Cibola County School District, CC Docket No. 02-6 (filed Aug. 24, 2018) (Grants/Cibola Request for Waiver).

II. BACKGROUND

A. Legal Background

3. Under the E-Rate program, eligible schools, libraries, and consortia (comprised of eligible schools and libraries) may request universal service discounts for eligible services, including connections necessary to support broadband connectivity to eligible schools and libraries.³ In the *2014 Second E-Rate Order*, the Commission expanded the high-speed broadband options available to applicants by equalizing the treatment of leased lit and leased dark fiber networks under the E-Rate program, which included making special construction of leased dark fiber and self-provisioned networks eligible for support.⁴ The Commission also adopted several safeguards, including service implementation deadlines, to ensure that E-Rate support is not used to purchase unnecessary services.⁵ Specifically, applicants may only receive E-Rate discounts for special construction charges related to leased lit or dark fiber if the fiber is lit by the end of the funding year⁶ (i.e., June 30),⁷ and special construction charges related to a self-provisioned network are only eligible for E-Rate support if the facilities are constructed and used by the end of the funding year.⁸ Applicants may obtain a one-year extension of the June 30 deadline to complete special construction and light the fiber, or use a self-provisioned network, if they demonstrate that construction was “unavoidably delayed due to weather or other reasons.”⁹

B. Consortium Factual Background

4. On July 21, 2016, the Consortium filed an FCC Form 471 requesting E-Rate discounts for, among other services, special construction related to a self-provisioned network for funding year 2016.¹⁰ USAC did not issue a funding commitment for that funding request until June 30, 2017, which was both the special construction service implementation deadline¹¹ and the deadline to request an extension of the special construction service implementation deadline.¹² The Consortium did not timely request an extension of the special construction service implementation deadline, and sought a waiver of that deadline from the Federal Communications Commission’s (FCC) Wireline Competition Bureau (Bureau).¹³ The Bureau granted the Consortium’s waiver request on December 6, 2017 and directed USAC to extend the deadline by which the Consortium was required to complete special construction and

³ See 47 CFR §§ 54.501-02.

⁴ *Modernizing the E-rate Program for Schools and Libraries, Connect America Fund*, WC Docket Nos. 13-184, 10-90, Second Report and Order and Order on Reconsideration, 29 FCC Rcd 15538, 15555, 15558, paras. 36, 43 (2014) (*2014 Second E-Rate Order*).

⁵ *Id.*

⁶ See 47 CFR § 54.507(d)(1) (stating that a recurring service must be used within the funding year for which discounts are sought to be eligible for support); *Rural Health Care Support Mechanism*, WC Docket No. 02-60, Report and Order, 27 FCC Rcd 16678, 16738, para.129 (2012) (“In the E-rate program, fiber must be lit within the funding year for non-recurring charges to be eligible.”); see also *2014 Second E-Rate Order*, 29 FCC Rcd at 15555, 15560, paras. 37, 49.

⁷ 47 CFR § 54.507(b) (establishing July 1 through June 30 as the funding year for the E-Rate program).

⁸ *2014 Second E-Rate Order*, 29 FCC Rcd at 15560, para. 49.

⁹ *Id.* at 15555-56, 15560, paras. 38, 49.

¹⁰ FCC Form 471 Application No. 161061354, Jemez Pueblo Tribal Consortium (certified July 21, 2016) (Consortium FCC Form 471).

¹¹ See *Request for Waiver by Jemez Pueblo Tribal Consortium; Schools and Libraries Universal Support Mechanism*, CC Docket No. 02-6, Order, 32 FCC Rcd 10238, 10242, paras. 4-5 (WCB 2017) (*2017 Jemez Waiver Order*).

¹² *Id.* at 10241-42, para. 3.

¹³ *2017 Jemez Waiver Order*, 32 FCC Rcd at 10242, para. 5.

use the self-provisioned network associated with its funding year 2016 funding request to June 30, 2018.¹⁴

5. The Consortium was unable to complete construction by its updated June 30, 2018 deadline, so it filed an FCC Form 500 to request another extension from USAC on June 29, 2018.¹⁵ On July 20, 2018, the Consortium filed its present Request for Waiver with the FCC, seeking an extension of the special construction service implementation deadline until August 31, 2018.¹⁶ The Consortium states that its special construction project was approximately 90 percent complete by the updated June 30, 2018 special construction deadline, but it was unable to timely complete the construction because an unavoidable and unforeseeable issue arose with the New Mexico Department of Transportation (NMDOT).¹⁷ Specifically, NMDOT ordered the Consortium's service provider, Kelly Cable of New Mexico (Kelly Cable), to halt construction until completion of an archeological survey covering the length of the special construction project.¹⁸ Kelly Cable complied with this request, but was unable to continue construction for the five weeks it took to complete the survey from April 18, 2018 until May 23, 2018.¹⁹ Afterwards, the Consortium was required to reapply for certain permits before resuming construction; NMDOT did not approve all necessary permits until July 9, 2018.²⁰ The Consortium asserts that, but for these delays, it would have completed its construction by June 30, 2018.²¹ The Consortium has advised the Bureau that it has completed construction and its self-provisioned network was in use on July 27, 2018.²²

C. Grants/Cibola Factual Background

6. On May 26, 2016, Grants/Cibola filed a funding year 2016 FCC Form 471 requesting E-Rate discounts for, among other services, special construction of a leased lit fiber network.²³ USAC issued a funding commitment on January 9, 2017,²⁴ and a request for additional information about the funding request in April 2017, after which Grants/Cibola's service provider ceased all work on the special construction project.²⁵ On April 25, 2017, Grants/Cibola timely requested, and USAC granted, an extension of the funding year 2016 special construction service delivery deadline until June 30, 2018.²⁶ As its funding request remained under review, Grants/Cibola requested another extension of the deadline by submitting an FCC Form 500 on June 26, 2018.²⁷ USAC completed its review in August 2018, and informed Grants/Cibola that it would have to seek a waiver from the Commission to get an additional

¹⁴ *Id.* at 10244, para. 11.

¹⁵ FCC Form 500 No. 112411, Jemez Pueblo Tribal Consortium (filed June 29, 2018) (Consortium Form 500).

¹⁶ Consortium Request for Waiver at 1.

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ *Id.* at 2.

²⁰ Consortium Response to USAC Review of FCC Form 500, Document No. 37332, 1 (dated July 16, 2018).

²¹ Consortium Request for Waiver at 1 ("The amount of time we need to complete [the] build is equal to the amount of time that the project was shut down.").

²² Email from Kimball Sekaquaptewa, Manager of Tribal Critical Infrastructure, AMERIND Risk, to Stephanie Minnock et al., Attorney Advisor, Telecommunications Access Policy Division, Wireline Competition Bureau, FCC (Sept. 26, 2018, 9:40 EDT).

²³ FCC Form 471 Application No. 161054349, Grants/Cibola County School District (certified May 26, 2016).

²⁴ Grants/Cibola Request for Waiver at Exhibit 2.

²⁵ *Id.* at 2.

²⁶ Administrator's Decision on Request for an Extension of Time to Complete Special Construction and Light or Use Fiber Services – Funding Year 2016, 1-2 (dated May 5, 2017).

²⁷ Grants/Cibola Request for Waiver at 2.

extension of the special construction service delivery deadline.²⁸

7. On August 24, 2018, Grants/Cibola filed a Request for Waiver with the FCC, seeking an 18-month extension of the service delivery deadline.²⁹ Grants/Cibola states that its project cannot be completed without a waiver of the service delivery deadline and that its project was unavoidably delayed due to circumstances outside its control.³⁰ Specifically, Grants/Cibola asserts that its service provider was unwilling to complete construction while USAC continued its review of Grants/Cibola's special construction funding request due to the uncertainty around the outcome of USAC's review and Grants/Cibola's ability to pay for services without E-Rate funding and that its updated June 30, 2018 service delivery deadline passed during the pendency of USAC's review.³¹

III. DISCUSSION

8. Based on our review of the facts and circumstances of these requests, we find good cause exists to warrant waivers of the deadline to complete special construction and any USAC procedural deadlines, such as the invoicing deadline, that might be necessary to effectuate our ruling. In the *2017 Jemez Waiver Order*, we concluded that the criteria for waiving the extension request deadline applicable to other non-recurring services "appropriately describe, at a high-level, the special circumstances that warrant a waiver of the deadline to extend the special construction implementation deadline."³² Similarly, in addressing the instant requests for waiver of the special construction service delivery deadline, we look to the special circumstances that warrant waiving the service implementation deadline for non-recurring services. In the context of the service implementation deadline applicable to other non-recurring services, we have issued waivers when (1) the applicant was unable to complete implementation for reasons beyond the service provider's control, and (2) the petitioner made good faith efforts to comply with Commission rules and procedures.³³ Moreover, we have issued waivers when the service provider is unwilling to complete installation because funding disbursements are delayed while the Administrator reviews the applicant's request for program compliance.³⁴ Based on the record of the instant cases, we find that the Consortium and Grants/Cibola have demonstrated that there are special circumstances justifying a waiver.

9. *The Consortium's Request.* The record shows that the Consortium was unable to complete installation due to circumstances beyond the applicant's and the service provider's control. In its waiver request, the Consortium describes its diligent effort to comply with the state and local rules for permitting of the project. Despite its efforts, the Consortium experienced an unforeseen obstacle in its progress when NMDOT halted construction five weeks prior to the expected completion date and required that an archeological survey be completed—a survey the Consortium had neither expected nor planned for because, according to the Consortium, it had completed similar construction projects without

²⁸ *Id.*

²⁹ *Id.* at 4. Grants/Cibola seeks an 18-month extension of the deadline from a grant of its waiver request.

³⁰ *Id.* at 2-4.

³¹ *Id.* at 4-5.

³² *2017 Jemez Waiver Order*, 32 FCC Rcd at 10242-43, para. 7.

³³ *Requests for Review/Waiver of the Decision of the Universal Service Administrator by Accelerated Charter*, CC Docket No. 02-6, Order, 29 FCC Rcd 13652, 13652-53, para. 2 (WCB 2014) (*Accelerated Charter Order*) (granting a waiver of the service delivery deadline for non-recurring services when petitioners were unable to complete implementation on time for reasons beyond the service providers' control).

³⁴ *Request for Review of the Decision of the Universal Service Administrator by Houston Independent School District*, CC Docket No. 02-6, Order, 20 FCC Rcd 16775, 16777-78, para. 6 (WCB 2005) (granting a waiver of the service delivery deadline for non-recurring services when funding disbursements were delayed while the Administrator conducted further review of the application for program compliance).

such a survey.³⁵ Further, the record shows that the Consortium made good faith efforts to meet the special construction service implementation deadline. In this regard, the Consortium planned to complete construction by the deadline and would have done so if NMDOT had not halted construction as the amount of time needed to complete the project was equal to the amount of time the project was shut down.³⁶ In addition, once the Consortium was able to resume construction, it brought in dozens of crews to help complete construction by the June 30, 2018 deadline, and was able to complete approximately 90 percent by the deadline.³⁷ At the time the Consortium filed its present Request, it had less than three miles of its planned 30.6-mile route to complete.³⁸

10. *Grants/Cibola's Request.* According to Grants/Cibola, its service provider was unwilling to continue work on the project given the uncertainty around the project's funding while USAC completed its program compliance review and Grants/Cibola's inability to fund the project absent E-Rate funding.³⁹ As a result of the additional time associated with USAC's review, which was completed more than a year-and-a-half after Grants/Cibola received its funding commitment,⁴⁰ Grants/Cibola's service provider did not have sufficient time to complete installation of the leased lit fiber network before the deadline.⁴¹

11. For the foregoing reasons, we conclude that the situations described in the petitioners' Requests warrant the extraordinary relief of a waiver of the service implementation deadline. Here, strict adherence to the Commission's rules would leave the petitioners with inadequate time to complete construction of their planned networks. We therefore direct USAC to set a service implementation deadline of July 31, 2018 for the Consortium so that USAC can continue to process the Consortium's outstanding invoices. We direct USAC to set a new deadline of April 30, 2020, by which time Grants/Cibola is required to complete special construction and begin using the leased lit fiber network associated with its funding year 2016 funding request.

12. We emphasize the limited nature of this decision and that we find the requested relief warranted based on the specific facts and circumstances of these requests. Although we grant these waiver requests, this Order does not alter the obligation of participants in the E-Rate program to comply with the Commission's rules.⁴² In this connection, we note that both the Consortium and Grants/Cibola attempted to request additional time to complete construction before the service implementation deadline expired by submitting an FCC Form 500 with USAC.⁴³ We advise applicants that require more than a one-year extension of the special construction service implementation deadline to file a request for waiver directly with the Commission before this deadline has lapsed. USAC is unable to grant more than a one-year extension of the special construction service implementation deadline because the Commission's rules only allow an extension of the special construction service implementation deadline of up to one

³⁵ Consortium Request for Waiver at 1-2.

³⁶ *See id.* at 1.

³⁷ *Id.* at 2; Consortium Form 500 at 1.

³⁸ Consortium Request for Waiver at 1; *see also* Consortium FCC Form 471 at 10.

³⁹ Grants/Cibola Request for Waiver at 4-5.

⁴⁰ *See id.* at 2.

⁴¹ *Id.* at 2, 4-5.

⁴² 47 CFR §§ 54.501-503.

⁴³ Consortium Request for Waiver at 1; Consortium Form 500; Grants/Cibola Request for Waiver at 2; FCC Form 500 No. 111335, Grants-Cibola County School District (filed June 26, 2018). Although we find these filings to be evidence of the petitioners' good faith efforts to comply with Commission rules and procedures, the petitioners should have filed requests for waiver with the Commission before the deadline lapsed, not FCC Forms 500 with USAC.

year.⁴⁴

13. Finally, we find no evidence of waste, fraud, or abuse presented by either petitioner's Request for Waiver of the June 30, 2018 implementation deadline. We emphasize that the Commission is committed to guarding against waste, fraud, and abuse and ensuring that funds disbursed through the E-Rate program are used for appropriate purposes. Although we grant these Requests for Waiver, this action does not affect the authority of the Commission or USAC to conduct audits or investigations to determine compliance with E-Rate program rules and requirements. Because audits or investigations may provide information showing that a beneficiary or service provider failed to comply with the statute or the Commission's rules, such proceedings can reveal instances in which universal service funds were disbursed improperly or in a manner inconsistent with the statute or the Commission's rules. To the extent that the Commission finds that funds were not used properly, the Commission will require USAC to recover such funds through its normal processes. The Commission retains the discretion to evaluate the use of monies disbursed through the E-Rate program and to determine on a case-by-case basis whether waste, fraud, or abuse of program funds occurred, or recovery is warranted. The Commission will continue to aggressively pursue instances of waste, fraud, or abuse under the Commission's procedures and in cooperation with law enforcement agencies.

IV. ORDERING CLAUSES

14. Accordingly, IT IS ORDERED that, pursuant to sections 0.91, 0.291, and 1.3 of the Commission's rules, 47 CFR §§ 0.91, 0.291, and 1.3, the requirement to build and use a self-provisioned network within the applicable funding year, as set forth in paragraph 49 of the *2014 Second E-Rate Order*, 29 FCC Rcd at 15560, para. 49, IS WAIVED for the Consortium to the extent described above. The Consortium's new service implementation deadline is July 31, 2018.

15. IT IS FURTHER ORDERED that, pursuant to sections 0.91, 0.291, and 1.3 of the Commission's rules, 47 CFR §§ 0.91, 0.291, and 1.3, the requirement to use a recurring service within the applicable funding year, as set forth in section 54.507(d)(1) of the Commission's rules, 47 CFR § 54.507(d)(1), IS WAIVED to the extent described above. Grant/Cibola's new deadline to complete special construction and light its network is April 30, 2020.

IT IS FURTHER ORDERED that, pursuant to Section 1.102(b)(1) of the Commission's rules, 47 CFR § 1.102(b)(1), this Order SHALL BE EFFECTIVE upon release.

FEDERAL COMMUNICATIONS COMMISSION

Ryan B. Palmer
Chief
Telecommunications Access Policy Division
Wireline Competition Bureau

⁴⁴ *2014 Second E-Rate Order*, 29 FCC Rcd at 15555, 15560, paras. 38, 49.